2011 IL App (2d) 101029-U
No. 2-10-1029
Order filed September 29, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF JOHN C. PASZKIET, JR., Deceased	)	Appeal from the Circuit Court of Lake County.
	)	
	)	No. 08-P-826
(Anne Paszkiet and Arlene Guskiewicz, Petitioners-Appellants, v. Norma Lass, as Administrator of the Estate of John C. Paszkiet, Jr., Deceased, Respondent-Appellee).	)	Honorable Diane E. Winter, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Bowman and Hutchinson concurred in the judgment.

ORDER

Held: The trial court erred in granting summary judgment to the respondent in a will contest, as the petitioners' acceptance of an interim distribution under the will did not effect an estoppel under the election doctrine: under the doctrine, either the petitioners were bound to their first decisive act, which was the will contest, or they did not take inconsistent positions, as their acceptance of the distribution was consistent with an intestate distribution.

¶ 1 This appeal arises from a will contest initiated by Anne Paszkiet and Arlene Guskiewicz. Anne and Arlene were both beneficiaries under the contested will of John C. Paszkiet, Jr,. and among his four heirs at law. After Anne and Arlene filed the petition contesting the will, the will's administrator, Norma Lass, filed a petition seeking the court's permission to deed a property to

Anne, Arlene, and a third heir and legatee, giving them the interests as specified by the contested will. The appellees did not object to the deed's issuance, and the court ordered issuance of the deed. Norma then moved for summary judgment in the will contest, asserting that, because Anne and Arlene had accepted property given them under the will, under the doctrine of election they were estopped to contest the will. The court granted summary judgment, and this appeal ensued. We hold that, because no inconsistency existed in Anne and Arlene's position, their acquiescence to the property's conveyance was not an election in favor of the will. We therefore reverse the grant of summary judgment and remand the cause.

I. BACKGROUND

¶ 2 John C. Paszkiet, Jr., died on August 8, 2008. On September 3, 2008, Norma, a friend, filed a petition for probate of the document that became the subject of the will contest and for her appointment as executor. The affidavit of heirship associated with Norma's petition listed as John's heirs his mother Anne, and his three sisters, Mary Paszkiet, Priscilla Paszkiet, and Arlene.

¶ 3 The contested will was dated May 28, 2008. It gave the "residue of [John's] estate" to Norma, with Don Lass (Norma's husband) to receive the residue if Norma predeceased him. It made a series of "special bequests." Notably, it gave a life estate in a property at 1804 Surrey Road, Arlington Heights, to Anne, with the remainder to Arlene and Mary as tenants in common. It directed the executor to sell a property at 9 Arrowhead Drive, Hawthorne Woods, and to use the proceeds to make cash gifts to a group of named friends.

¶ 4 Anne and Arlene appeared through counsel and filed a "Petition for Formal Proof of Will." They alleged that John had lacked testamentary capacity at the time of the will's making and that Norma had exercised undue influence over him. They further alleged that certain property of which the will purported to make a gift—a sculpture, for instance—was not John's but Anne's.

¶ 5 On December 17, 2008, the court admitted the will to probate.

¶ 6 On March 30, 2009, Arlene and Anne filed a "Petition to Contest Will." They alleged again that John lacked testamentary capacity and further that Norma, as a caregiver, had undue influence over him. At the time of his death, John had property worth "more than $845,000." He had been a lymphoma patient since he was six, but, when he made the contested will, he had acute symptoms. The day before he made his will and early into the morning that he made it, he had been at the emergency room suffering respiratory distress. Norma picked him up at the hospital. Later that day, she took him to the offices of her attorneys, with whom John had had no prior contact, and there he made his will.

¶ 7 On April 22, 2009, Norma filed a "Petition for Approval of Executor's Deed." She alleged that the real-estate tax and insurance obligations relating to the Arlington Heights house were burdens on the estate. She further asserted:

> "The same individuals will be entitled to an interest in the Arlington Heights house whether it is conveyed presently through Decedent's Last Will and Testament, or through intestate succession (if Arlene Guskiewicz and Anne Paszkiet are successful in their Petition to Contest Will)."

¶ 8 Anne and Arlene filed no response to the petition. On April 30, 2009, the court ordered the issuance of the deed.

¶ 9 Norma then filed a response to the "Petition to Contest Will" in which she denied John's lack of capacity and her undue influence.

¶ 10 On August 11, 2009, Norma petitioned for leave to execute a grantee's statement that the Cook County Recorder of Deeds required Anne, Mary, and Arlene to execute before the office would record the deed. She alleged that she had repeatedly sent the document to counsel for Anne

and Arlene, but had received no response. She further alleged that delay in recording the deed hurt the estate because the estate continued to have to pay real-estate taxes. The court ordered Arlene and Anne to tender the executed grantees' statement within seven days.

¶ 11 On April 9, 2010, Norma moved for summary judgment on Anne and Arlene's petition to contest the will. Norma asserted that, among other things, under the doctrine of election, Anne and Arlene, by accepting the deed to the Arlington Heights house without objection, had effectively admitted the validity of the will. Norma filed an affidavit of her own in support of the motion.

¶ 12 Anne and Arlene responded. They argued that they had not accepted a benefit under the will. They stated that Anne had owned the Arlington Heights house for about 40 years. Anne had conveyed the house to John solely to facilitate getting a home-equity line of credit. After that conveyance, she continued to make all payments related to the upkeep of the house. In support of their position, they relied on *In re of Estate of Nichols*, 188 Ill. App. 3d 724 (1989). They argued that "the agreement between the decedent and his mother preclude the Arlington Heights Property from being considered a benefit conveyed under the will."[1] They did not attach affidavits to the response and did not verify it. They did attach a copy of a Cook County Recorder of Deeds web page that summarized the transfers of the property.

¶ 13 Norma replied, noting the lack of affidavits or other proper evidence controverting the matters raised in the motion.

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[1]Although Anne and Arlene's assertions seem to have been structured to allege the existence of a resulting trust (see, *e.g.*, *In re Marriage of Link*, 362 Ill. App. 3d 191, 195 (2005)), such that John held title to the house solely as a trustee, they never explicitly make that claim.

¶ 14 Anne and Arlene then filed an affidavit of Anne's in which she averred that the Arlington Heights house had been her primary residence from 1965 until May 2008. Her husband had died in 2001. In 2004, she decided that the house needed renovation. Unable to obtain financing, she asked John to take title solely to facilitate the obtaining of a home-equity line of credit. Before John applied for the line of credit, she gave him $90,000 for use in making payments. Bank One gave John a line of credit and recorded a mortgage on the house. In 2004, Anne realized that John's health had become too poor for him to help with the renovation project, and she therefore sought to end the line of credit. The bank released its lien on May 8, 2008.

¶ 15 On June 17, 2010, the court granted the motion for summary judgment on the basis that, by accepting the deed, Anne and Arlene elected to accept the will.

¶ 16 Anne and Arlene filed a timely motion to reconsider. The discussion emphasized that "the Arlington Heights Property was not a benefit to be conferred" and that the sole purpose of Anne's conveyance of the property was to have John act as what amounted to the guarantor of a home-equity loan. The court denied the motion to reconsider, and Anne and Arlene timely appealed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, Anne and Arlene argue that, under the holding of *Nichols*, the doctrine of election does not apply to a person who accepts the deed to her primary residence from an estate. Norma responds that *Nichols* is distinguishable; that the heir and legatee in that case merely continued to live in a house given to her under the contested will, and did not accept a deed, making her "election" less clear than Anne and Arlene's.

¶ 19 Our review of a grant of summary judgment is *de novo*. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010). "Summary judgment is proper where the 'pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Millennium Park Joint Venture*, 241 Ill. 2d at 308-309 (quoting 735 ILCS 5/2-1005(c) (West 2008)).

¶ 20 We hold that the court erred in ruling that the doctrine of election applied to estop Anne and Arlene to contest the will. The doctrine of election estops a party only to taking an inconsistent position, and Anne and Arlene's position was always consistent. It was only Norma's position that changed. To the extent that Anne and Arlene made any election, existing authority suggests that it was one *against* the will, an election that they made when they filed their petition to contest the will.

¶ 21 This analysis has little in common with that suggested by Anne and Arlene's arguments. Anne and Arlene's briefs share with Norma's, assumptions about the doctrine of election that are misconceptions which this court does not wish to reinforce. However, even if we accepted those assumptions, we would, for reasons we discuss later, nevertheless reverse the grant of summary judgment.

¶ 22 We start with an explanation of the doctrine of election in its core and broad forms. The core doctrine of election is narrow. It applies when a testator makes a will that purports to dispose of property belonging to a person who is a beneficiary under the will. Under those circumstances, the beneficiary is put to an election: retain her property or accept the benefit. *Oglesby v. Springfield Marine Bank*, 395 Ill. 37, 45 (1946). To try to keep both is inconsistent, and having made one choice, the beneficiary is estopped to make an inconsistent claim. To accept the benefit under the will is to make one choice; it requires giving up the property. To show a clear determination to keep the property is thus to make the other choice; it implies rejection of the benefit under the will. It is the first choice that binds:

> "The text writers and decided cases lay down the rule, with practical uniformity, that, where one has an election between several inconsistent courses of action, he will be confined to that he *first* adopts and *any decisive act*, done with knowledge of his rights and of all the facts, *determines his election*, and estops him from asserting to the contrary." (Emphases added.) *Carper v. Crowl*, 149 Ill. 465, 480 (1894).

¶ 23 The core doctrine applies only when the acceptance is one of a benefit to which the beneficiary has no other claim:

> "Where a devisee or legatee *takes something under the will to which he would not be otherwise entitled*, and at the same time seeks to hold property disposed of by the will to which he would be entitled if there had been no will, the doctrine of election applies." (Emphasis added.) *Schuknecht v. Schultz*, 212 Ill. 43, 48 (1904).

A modern example of an application of this rule is found in *Luepker v. Rieso*, 119 Ill. App. 3d 62, 66-67 (1983), in which a Fifth District panel held that, where a widower accepted property given him by his wife's will that was of lower value than the statutory surviving spouse award to which he was entitled, he had not made an election. In other words, the doctrine applies only to estop the beneficiary to take any position inconsistent with the acceptance of the distribution from the estate. To accept something to which one would be entitled regardless is not an attempt to get the benefit of inconsistent positions; it is not trying to have things both ways.

¶ 24 The core doctrine could be applied in this case. John's will purported to make gifts of certain property that Anne claimed as her own, such as a sculpture. Moreover, Anne's affidavit appears to be structured to imply a continuing claim to the Arlington Heights house by way of a resulting trust. See *Link*, 362 Ill. App. 3d at 195. Given that the will purported to dispose of Anne's claimed property, the core doctrine would bind her to her first decisive act—the contest of the will. Thus,

under the core doctrine, summary judgment against Anne and in favor of Norma was improper. That said, the record and the appellate briefs make clear that the parties and the court were applying a broader form of the doctrine of election.

¶ 25 The broader form of the doctrine is that one must accept the validity of a will as a whole or not at all, so that the acceptance of a benefit under the will is an election to accept the whole.[2] It, too, is a requirement that a party must maintain a consistent position. In a relatively recent formulation, "once a beneficiary has accepted a bequest under the will, she will be estopped from asserting any claim inconsistent with the validity of that will." *Kyker v. Kyker*, 117 Ill. App. 3d 547, 551 (1983).

¶ 26 At this point, one might logically ask whether the broader form of the doctrine incorporates the limitations of the core form. That is, one might ask (1) whether the election is made by the first decisive act and (2) whether the doctrine applies when the benefit accepted is one that the beneficiary might otherwise claim. Given the particular facts of this case, we do not need to separately answer the two parts of the question. Where the will contest comes first and is followed by acceptance of property that is consistent with the distribution sought by those contesting the will, no inconsistency of position exists. Such interim distributions are what should be expected when the parties to the contest are acting reasonably. We find no authority that requires treating such interim distributions as elections in favor of the will, and we would be disinclined to follow any merely persuasive authority that reached such a result.

[2]Obviously, accepting a benefit does not preclude a dispute as to the meaning of some part of a will, just its overall validity.

¶ 27 On this basis, we can easily conclude that Anne and Arlene did not make an election in favor of the will. To review, Anne and Arlene's first act in the case was to object to the will's admission to probate. When the court rejected that objection, they filed their petition to contest the will. While that petition was pending, Norma filed a petition seeking to convey the Arlington Heights property. She described the house as a burden on the estate and stated:

> "The same individuals will be entitled to an interest in the Arlington Heights house whether it is conveyed presently through Decedent's Last Will and Testament, or through intestate succession (if Arlene Guskiewicz and Anne Paszkiet are successful in their Petition to Contest Will)."

The form in which Norma sought to convey the house was, to be sure, the one specified by the will. Anne and Arlene did not object to the distribution. The court ruled that, in this, they had elected in favor of the will.

¶ 28 As the quoted passage points out, there is nothing to suggest that this distribution would be inconsistent with an intestate distribution. Under an intestate distribution, assuming that the affidavit of heirship is correct, John's three sisters would take equal shares, and Anne would take a double share. See 755 ILCS 5/2-1(d) (West 2008). However, because John had property other than the Arlington Heights house, various treatments of this specific property could be consistent with an intestate distribution.

¶ 29 The only person that the facts show to have acted inconsistently is Norma. She initially presented the proposed conveyance as a benefit to the estate and an action that the court could take without fear that Anne and Arlene's success in the will contest might require undoing the conveyance. Later, Norma argued that this conveyance resulted in an acceptance of a benefit under the will. We have no reason to suspect that Norma was deliberately trying to set a trap into which

Anne and Arlene might fall while staying consistently to their original course. Whatever the intent, such a trap was the result. Given the consistancy of Anne and Arlene's position, no election in favor of the will occurred.

¶ 30 As we stated, this analysis is not Anne and Arlene's. We consider it important to make clear that the doctrine of election is primarily a requirement that a party maintain a consistent position and is not a rule that any distribution from an estate is fatal to a will challenge. Anne and Arlene's analysis obscured these points. Nevertheless, Anne and Arlene's brief stated a basis for reversal. In particular, their reliance on *Nichols* was well placed.

¶ 31 In *Nichols*, the decedent left to her daughter (who became the plaintiff in a will contest) two parcels of real estate, one of which included the house in which the daughter had lived, without having a lease or paying rent, for 20 years. *Nichols*, 188 Ill. App. 3d at 725. The probate court found that the daughter, based on her continued residence in the house without offering to pay rent to the estate, had accepted a benefit under the will, and was therefore estopped to contest it. It ruled that, to avoid such estoppel, she would have had to either pay rent or vacate the house. *Nichols*, 188 Ill. App. 3d 726-27. (The decision implies that the daughter made mortgage and property tax payments herself.) The appellate court held that this was an unjust application of the doctrine of election:

> "[E]stoppel does not apply where, as here, a person contesting a will (1) continues to live in a residence in which she had been living for several years, and (2) makes payments and expresses concern to ensure that she will be able to reside in that home for the foreseeable future. As defendants conceded during oral arguments, if we were to hold otherwise on these facts, plaintiff would be forced to move out of her home in order to bring an action contesting the will. We cannot accept that result.

> By this holding, we are placing an affirmative duty upon executors of estates to take whatever steps they deem necessary in order to demonstrate that an occupant of a residence that passes to that occupant under a will, such as plaintiff in this case, has knowingly and intelligently elected to receive the benefits given to her under that will." *Nichols*, 188 Ill App. 3d at 727.

¶ 32 Anne and Arlene describe the facts in *Nichols* as "almost identical" to those here. That is something of an exaggeration; no one seems to have suggested that Anne had to move. However, a precise correspondence of facts is unnecessary for us to deem applicable the holding that the executor has some degree of duty to beneficiaries. Anne and Arlene would have us recognize an affirmative duty of an administrator to inform a beneficiary that the acceptance of his or her own residence will be deemed an election. We need not decide whether we recognize such an affirmative duty. It is enough that we recognize a weaker rule: the administrator has a duty to avoid misleading a beneficiary who is also an heir about whether a distribution is a benefit under the will. We think that it is improper to recognize an election where the administrator has made statements that would mislead a reasonable beneficiary.[3] Under this rule, a natural extension of *Nichols*, because the "Petition for Approval of Executor's Deed" would have suggested to a reasonable person that the

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[3] Such a rule is useful only if *Schuknecht*'s statement of the doctrine of election, that an election occurs only "[w]here a devisee or legatee takes something under the will to which he would not be otherwise entitled" applies only to the narrow form of the doctrine. *Schuknecht*, 212 Ill. at 48. That is, if no election is triggered when a beneficiary accepts property that would come to him or her regardless of the outcome of a will contest, then the kind of unintended election that we are concerned to prevent is unlikely.

deed was not a benefit under the will, the acquiescence to the conveyance cannot be an election. This too is a proper basis for reversal.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we reverse the grant of summary judgment and remand the cause.

¶ 35 Reversed and remanded.